In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1214

HENRY FLETCHER THOMAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that 18 U.S.C. App. 1202(a), which prohibits previously convicted persons from receiving firearms in or affecting interstate commerce, does not encompass the receipt of a firearm which had been transported in interstate commerce prior to the date the statute was enacted. Petitioner also contends that he was denied a fair trial by the introduction of evidence that his prior felony conviction was for robbery, that he served five years in prison for that offense, that evidence of his receipt of the firearm came to light when he was arrested for "stripping" an automobile, and that he stated to the federal arresting officer that he had stolen the firearm.

After a jury trial in the United States District Court for the Western District of Kentucky, petitioner, having previously been convicted in state court of robbery, was convicted of receiving and possessing a .22 caliber Rossi revolver that had previously moved in interstate commerce, in violation of 18 U.S.C. App. 1202(a). Petitioner was sentenced to two years' imprisonment, and the court of appeals affirmed (Pet. App. A11).

On February 17, 1974, two Louisville, Kentucky, police officers, responding to a radio call, came upon petitioner and Robert Faust as they were "stripping" an automobile and loading the parts into the back of their car (Tr. 54-55). The officers approached petitioner and Faust with their guns drawn, told them they were under arrest, and ordered them not to move (Tr. 50-51). However, when petitioner placed his hand in his right coat pocket, one of the officers ordered petitioner to "freeze" and removed his hand, which was holding a fully-loaded .22 caliber Rossi revolver, from the pocket (Tr. 51, 52, 55).

After receiving *Miranda* warnings, petitioner told the officers that he had just been released from prison, having served a sentence for robbery (Tr. 53-54). Subsequently, when petitioner was arrested by a federal agent for receiving and possessing the revolver and warned of his constitutional rights, he made several admissions: that he had stolen the revolver the night before his arrest by the local police; that he had been convicted in state court for robbery; and that he had served five years in prison for that offense (Tr. 31-33, 34). At about the mid-point of the trial, petitioner stipulated that he had been convicted of robbery (Tr. 65) and that the firearm in question had been transported from Ohio to Kentucky (by someone other than petitioner) on or about January 18, 1968 (Tr. 66, 68, 69).

Petitioner testified, contrary to the testimony of the arresting officers, that although both he and Faust were involved in the theft of the revolver, Faust had possession of the firearm at the time of their arrest (Tr. 90, 97). Faust, as a defense witness, testified to the same effect; he also stated that he had never been convicted of a felony (Tr. 100-101, 105-106).

1. Petitioner contends that 18 U.S.C. App. 1202(a) does not encompass the receipt of a firearm that had been transported in interstate commerce prior to June 19, 1968, the date Section 1202(a) was enacted into law.

In *United States* v. *Bass*, 404 U.S. 336, 350, this Court stated, however, that the government meets its burden under Section 1202(a) of demonstrating an interstate nexus "if it demonstrates that the firearm received has previously traveled in interstate commerce." Although the narrow question raised by petitioner was not presented in *Bass*, we submit that the foregoing quotation, in which the Court did not recognize any time limit on the previous interstate transportation, is a correct statement of the law. Courts of appeal in three circuits, in addition to the Sixth Circuit in the instant case, have affirmed judgments under Section 1202(a) where the only interstate movement of the firearm occurred prior to the enactment of the statute. *United States* v. *Three Winchester 30-30 Cal. L. Act. Car.*, 504 F.2d 1288, 1291 n. 7 (C.A. 7); *United States* v. *Mancino*, 474 F.2d 1240, 1241-1242 (C.A. 8), certiorari denied, 412 U.S. 953; *United States* v. *Giannoni*, 472 F.2d 136, 137 (C.A. 9), certiorari denied, 411 U.S. 935.

While proof of interstate movement of the firearm is essential to establish federal jurisdiction, it is not part of the *actus reus* of the offense of "receiving." That is, the government is not required to prove that the defendant caused the interstate movement of the weapon, nor indeed that he knew the weapon had so moved. See, *e.g.*, *United States* v. *Lupino*, 480 F.2d 720 724 (C.A. 8), certiorari denied, 414 U.S. 924; *United States* v. *Mullins*, 476 F.2d 664 (C.A. 4), certiorari denied, 414 U.S. 839; *United States* v. *Belperio*, 452 F.2d 389, 391 (C.A. 9). Since petitioner, a convicted felon, received the firearm subsequent to the enactment of Section 1202(a), the fact that the firearm did not travel in interstate commerce after the date of enactment is irrelevant, and petitioner's conviction does not involve a retroactive application of Section 1202(a).

2. Petitioner contends that he was denied a fair trial by the introduction of evidence that his prior felony conviction was for robbery, that he served five years in prison for that offense, that his receipt and possession of the firearm was discovered when he was arrested for "stripping" an automobile, and that he stated to the federal officer who arrested him that he had stolen the firearm. None of these claims has merit.

a. The indictment charged and evidence was admitted to prove that prior to the time petitioner received the revolver he had been convicted of robbery. Petitioner concedes that it was proper to inform the jury that he had been convicted of a felony, but he claims the jury should not have been told that the felony was robbery (Pet. 5). However, the government was obliged to prove petitioner's prior conviction, since petitioner did not stipulate to the conviction until after the following had occurred at trial: the district court informed the jury panel of the nature of the case, the prosecutor read the indictment to the jury,[1] the federal investigator testified that petitioner admitted to having been convicted of robbery and that he had requested a comparison of petitioner's fingerprints with those of the Henry Fletcher Thomas who had been in prison for the robbery, a police officer testified that petitioner admitted to the robbery conviction, and a fingerprint expert was qualified so that he could give his opinion of the fingerprint comparison (Tr. 4-5, 27, 34, 35-37, 54, 64). Under the circumstances, evidence of the nature of the felony was properly admitted. *United States* v. *Kemper*, 503 F.2d 327, 330 (C.A. 6), certiorari denied, No 74-5461, January 20, 1975; *United States* v. *Fields*, 500 F.2d 69, 70 (C.A. 6), certiorari denied, 419 U.S. 1071; cf. *Spencer* v. *Texas*, 385 U.S. 554;

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[1]Petitioner did not move to strike from the indictment the identification of his felony conviction as that of robbery. Cf. *United States* v. *Kemper*, 503 F.2d 327 (C.A. 6), certiorari denied, No. 74-5461, January 20, 1975; *United States* v. *Fields*, 500 F.2d 69 (C.A. 6), certiorari denied, 419 U.S. 1071.

Michelson v. *United States*, 335 U.S. 469, 475 n. 8. Moreover, since petitioner testified in his own defense, evidence concerning petitioner's prior felony conviction would have been admissible for impeachment purposes. See *Spencer* v. *Texas, supra*, 385 U.S. at 560-561.

b. Petitioner argues that reference to the fact that he served five years in prison for the robbery conviction was prejudical.[2] Althou h petitioner objected to the testimony, when the trial court subsequently instructed the jury that the fact that petitioner had spent five years in prison was "of no consequence or significance in this case," petitioner objected to the instruction, stating that it was "contrary to Defense counsel's argument that he had already been punished" for the robbery and should not be put "back [in] the penitentiary" (Tr. 114, 131, 134, 139). Although petitioner contended in the court of appeals both that the admission of the evidence was error and that the cautionary instruction was prejudicial (Br. 18-19), he now argues only that the evidence was prejudicial. However, even assuming that it was improper to inform the jury that petitioner had served five years in prison, the introduction of this evidence was, as the court of appeals held (Pet. App. A12), harmless beyond a reasonable doubt.

c. Petitioner contends that it constituted prejudicial error to introduce evidence that he and Faust had stolen the firearm. But petitioner's receipt of the firearm after his felony conviction was an essential element of the offense, and the evidence was manifestly relevant to establish that element. Moreover, when petitioner objected to this evidence, the trial court instructed the jury that petitioner was not on trial for theft of the weapon and that the jury should disregard the evidence concerning the theft

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[2]The reference occurred in the course of testimony of a government agent (Tr. 34) that, as shown earlier, was necessitated by petitioner's refusal to stipulate to his prior felony conviction.

(Tr. 34). Subsequently, both petitioner and his witness, Robert Faust, testified that they had stolen the revolver (Tr. 97, 105). Under the circumstances, petitioner cannot complain.

d. Petitioner claims that he was prejudiced by testimony concerning the circumstances of his arrest by the local police and by the fact that the jury learned that the police had charged him with grand larceny for removing the automobile parts. However, the discovery of the firearm in petitioner's pocket (a matter as to which the evidence was in conflict) was so inextricably tied to his arrest and his activities at the time of his arrest that the two could not have been separated. In addition, it was necessary to explain to the jury how the government learned of the offense and obtained the evidence, since without an explanation the jury could have inferred that petitioner had been the object of police misconduct and was entitled to leniency. Moreover, the trial court instructed the jury that "the charges placed against this man by the City Police growing out of this alleged occurrence are of no concern to us. We are only concerned with whether he had possession of a weapon" (Tr. 56). Finally, petitioner himself brought out that the grand larceny charges had been "filed away" because there was no prosecuting witness (Tr. 59). Under these circumstances, petitioner suffered no prejudice.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JUNE 1975.